

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**

**MISCELLANEOUS CAUSE NO.287 OF 2016**

- 1. KIGEZI HIGHLAND TEA CO. LTD**
- 2. KINKIIZI DEVELOPMENT CO. LTD----- APPLICANTS**

**VERSUS**

**NATIONAL AGRICULTURE ADVISORY SERVICES (NAADS).....RESPONDENT**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**RULING**

The Applicant filed an application for Judicial Review brought under Article 28, and 42 Constitution and Section 14,33, 36 & 38 of the Judicature Act as amended, Rules 3, 6, 7 and 8 of the Judicature (Judicial Review) Rules, 2009 for the following Judicial review orders;

- 1.) A Declaration that the respondent's decision communicated on 22<sup>nd</sup> September 2016 in as far as it purports to exclude District Local Governments of Kabale, Kisoro, Kanungu, Rukungiri, Ntungamo and Mitooma from working with the applicants who are lead agencies under MOUs in null and void, illegal and abuse of the respondent's authority.

- 2.) A Prerogative Order of Certiorari doth issue to quash the decision of the respondent communicated on 22<sup>nd</sup> September 2016 that purports to exclude District Local Governments of Kabale, Kisoro, Kanungu, Rukungiri, Ntungamo and Mitooma from working with the applicants who are lead agencies under MOUs for the “Tea Development Project”.
- 3.) An order of Prohibition doth issue against the Respondent restraining her from further interfering with the implementation of the subsisting Memoranda of Understanding (MOUs) entered into between the applicants and the respective District Local Governments of Kabale, Kisoro, Kanungu, Rukungiri, Ntungamo and Mitooma.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavit in support of the applicant by James Musinguzi Garuga but generally and briefly state that;

- 1) The respondent made a decision communicated in various letters dated 22<sup>nd</sup> September 2016 addressed to Chief Administrative Officers of Kabale, Kisoro, Kanungu, Rukungiri, Ntungamo and Mitooma with directive (e) **‘As communicated in the letter of 17<sup>th</sup> August 2016 this arrangement does not provide for the previous arrangements that involved the Lead Agency’**.
- 2) The intention of this communication is to restrain District Local Governments Kabale, Kisoro, Kanungu, Rukungiri, Ntungamo and Mitooma from involving their respective Lead Agencies (Applicants) in the supply and planting of tea seedlings irrespective of their obligations under MoUs.
- 3) The applicants have active Memoranda of Understanding with the District Local Governments of Kabale, Kisoro, Kanungu, Rukungiri,

Ntungamo and Mitooma for the Tea Development Project as Lead Agencies whose core components include but no limited to selection of nursery operators to supply tea plantlets, identification of beneficiary farmers, distribution of clonal tea seedlings, mobilization of farmers to form cooperatives for marketing and provide market outlets for the green leaf.

- 4) The applicants have pursuant to the said MoUs over the years invested heavily in recruitment and deployment of labour and constructed a Tea factory in Kanungu District and by February 2017 the other factories in Kabale and Kisoro will be opened at the cost of 3m US dollars for the purposes of providing direct market to the tea farmers.
- 5) The applicants have never been in anyway consulted in respect to the decision that was made and considers it unfair, irregular and as such clandestinely procured to frustrate their business undertakings.
- 6) If the directive of the respondent is allowed to remain in force would amount to change of government policy and yet such a decision was procured by technical officers who have no mandate to make sweeping policies aware of the fact that NAADS currently has no Board in place as mandated by the law.
- 7) The said Memoranda of Understanding have all been cleared by the Solicitor General and are being implemented by parties and the respondent has respected them and has on numerous occasions effected payments for the consultancy work done by the applicants for the respective District Local Governments.

The respondent opposed this application and filed an affidavit in reply through its Acting Executive Director-Dr. Christopher Bukenya.

The respondent contended that they were delegating procurement of 17,040,000 tea seedlings to Kabale, Kanungu and Rukungiri District Local Governments in a single transaction in accordance with the available resources amounting to a total of 7,668,000,000/=.

The three letters dated 22<sup>nd</sup> September 2016, by the respondent to Kabale, Kanungu and Rukungiri District Local Governments to follow the following guidelines;

- Undertake procurement of Tea Seedlings to strengthen Tea production in the District in adherence to the PPDA Local Government Procurement and Disposal Regulations.
- To follow the critical procurement steps and guidelines for funds flow in engaging suppliers of Tea Seedlings under the delegation procurement arrangement.
- To use the suppliers for tea Seedlings prequalified by the District Local Government.
- In case the District did not have pre-qualified Tea suppliers to utilize the prequalified suppliers of the neighbouring district Local governments or those pre-qualified by the Ministry of Agriculture, Animal Industry and Fisheries.
- To minimize damages to the seedlings that could result from transportation of Tea seedlings over long distances.

- As communicated earlier in the letter of 17<sup>th</sup> August 2016, the current delegated procurement arrangement did not provide for previous arrangements that involved lead agency.
- Once the procurement process was completed, to submit the documents for payment upon verification by the respondent's secretariat.
- The documents to submitted to the secretariat were to include the following;  
Minutes of the contracts committee, The original local purchase order or contract, technical Inspection report by a subject matter specialist, original invoices or demand notes, delivery notes and acknowledgment of receipt by benefitting farmers.

That the three letters were only concerned with a single transaction in the respective districts and was giving instructions on how the funds committed under the delegated procurement with the respective District Local governments were to be utilized.

The respondent was also advising the local governments to seek guidance from the Directorate of Agricultural Extension on all matters relating to engagement of lead Agencies in the provision of agricultural extension and related services.

That the said letter dated 17<sup>th</sup> August 2016, made it clear, that any future engagement of the private Service Providers by the concerned District local Governments in promotion of Tea was to be guided by the Directorate of Agricultural Extension in the Ministry of Agriculture, Animal Industry and Fisheries.

The deponent attempted to explain the meaning of the letter or what was intended by the said letter to the respective district local governments.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

Four issues were proposed for court's resolution;

1. Whether or not the respondent's decision communicated in three letters dated 22<sup>nd</sup> September, 2016 delegating Kabale, Kanungu and Rukungiri District Local Governments for the procurement of a total of 17,040,000 tea seedlings worth 7,668,000,000/= without the involvement of the Lead Agency was irregular, illegal, an abuse of its authority, unfair, made in error and null and void.
2. Whether the decision communicated in the three letters dated 22<sup>nd</sup> September Kabale, Kanungu and Rukungiri District Local Governments for the procurement of a total of 17,040,000 tea seedlings worth 7,668,000,000/= without the involvement of the Lead Agency amounted to a change of Government policy?
3. Whether the order of Certiorari could issue to quash the decision of the respondent communicated in the three letters dated 22<sup>nd</sup> September, 2016 delegating to Kabale, Kanungu and Rukungiri District Local Governments for the procurement of 17,040,000 tea seedlings worth 7,668,000,000/= without the involvement of the Lead Agency?

4. Whether the decision of the respondent communicated in the three letters dated 22<sup>nd</sup> September, 2016 delegating to Kabale, Kanungu and Rukungiri District Local Governments for the procurement of 17,040,000 tea seedlings worth 7,668,000,000/= without the involvement of the Lead Agency interfered with the implementation of the subsisting Memorandum of understanding between the applicants and Kanungu District Local Government.?
5. Whether the applicants are entitled to the reliefs sought?

I shall resolve this application in the order of the issues so raised. The applicants were represented by *Mr Agaba Simon* whereas the respondent was represented by *Mr Fred Kiiza Busingye*.

In Uganda, the principles governing Judicial Review are well settled. Judicial review is not concerned with the decision in issue but with the decision making process through which the decision was made. It is rather concerned with the courts' supervisory jurisdiction to check and control the exercise of power by those in Public offices or person/bodies exercising quasi-judicial functions by the granting of Prerogative orders as the case may fall. It is pertinent to note that the orders sought under Judicial Review do not determine private rights. The said orders are discretionary in nature and court is at liberty to grant them depending on the circumstances of the case where there has been violation of the principles of natural Justice. The purpose is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected to. *See; John Jet Tumwebaze Vs Makerere University Council & 2 Others Misc Cause No. 353 of 2005, DOTT Services Ltd Vs Attorney General Misc Cause No.125 of 2009, Balondemu David Vs The Law Development Centre Misc Cause No.61 of 2016.*

For one to succeed under Judicial Review it trite law that he/she must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

The dominant consideration in administrative decision making is that public power should be exercised to benefit the public interest. In that process, the officials exercising such powers have a duty to accord citizens their rights, including the right to fair and equal treatment.

### **ISSUE ONE**

- 1. Whether or not the respondent's decision communicated in three letters dated 22<sup>nd</sup> September, 2016 delegating Kabale, Kanungu and Rukungiri District Local Governments for the procurement of a total of 17,040,000 tea seedlings worth 7,668,000,000/= without the involvement of the Lead Agency was irregular, illegal, an abuse of its authority, unfair, made in error and null and void.*

This issue arose from the directive of the respondent to the Chief Administrative Officers that fetters the relationship between the applicant and the District Local Governments.

The respondent wrote the Chief Administrative Officers of Kabale, Kisoro, Kanungu, Rukungiri, Ntungamo and Mitooma with a directive (e) As communicated in the earlier letter of 17<sup>th</sup> August 2016 this arrangement does not provide for the previous arrangements that involved the Lead Agency.

This communication was intended to avoid an existing arrangement between the applicant and the local district governments. In effect it would render the arrangement redundant since the respondent was funder of the district Tea Development Projects.

The respondent seems to have taken the initiative to avoid the involvement of the Lead Agency in the Tea Project by issuing new guidelines to procure Tea plantlets to strengthen tea production in the said districts in adherence to the PPDA Local Government Procurement and Disposal regulations.

*“As per the letter dated 17<sup>th</sup> August, 2016, this arrangement does not provide for the previous arrangements that involved the Lead Agency”*

The respondent was creating a bypass to the applicant’s Memorandum of Understanding and this would in the end have meant the abandonment of the any dealings with the applicant.

The respondent contends that by the said memoranda of Understanding have since all expired and that the applicant does not have any locus to sustain an action against the respondent.

This matter is being determined on the facts that were presented on 27<sup>th</sup> October 2016, the argument of counsel based on evidence from the bar cannot suffice. It would appear that he has indeed conceded that at the time the applicant came to court he had a bonafide grievance with the decision of the respondent. The project period as per all the Memoranda of Understanding is provided as follows;

*“The MOU will be effective for a period of 3 years from the date of signature by both parties and will be subject to renew on satisfactory implementation of this MOU.”*

It can be deduced from the above clause that the even if the project period had expired as the respondent’s counsel has submitted, the same can be renewed by the respective parties.

The respondent’s guidelines that were issued to the Chief Administrative Officers had to consider the existing state of affairs in order to avoid

pushing the respective districts in breaching their obligations to other third parties under the Memoranda of Understanding.

The decision of the respondent had the effect of fettering the discretion which is a ground for challenging the decision for illegality. To fetter one's discretion is to abuse that discretion. The law expects that public functionaries would approach the decision making process with an open mind.

Illegality as a ground of review looks at the law and the four corners of the legislation and application of the law and policies to the public i.e its powers and jurisdiction. When power is not vested in the decision maker then any acts made by such a decision maker are ultra vires and when power is applied blindly with direct effect to existing rights then it becomes unlawful exercise of power.

In the case of *R v Lord President of the Privy Council, ex parte Page* [1993] AC 682 Lord Browne-Wilkinson noted;

*“ The fundamental principle(of judicial review) is that the courts will intervene to ensure that the powers of a public decision-making bodies are exercised lawfully. In all cases...this intervention...is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a Wednesbury sense, reasonably. If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is wednesbury unreasonable, he is acting ultra-vires his powers and therefore unlawful.”*

The letters by the respondent to the different district local governments were in effect contracting away the statutory powers of the said districts

and were in effect cancelling the existing contract or arrangements and directing them to terminate the contracts or memoranda of understanding.

The sum effect of the said letters was contracting away the district local Governments Administration statutory powers by refraining from continuing with the contracts. The basic principle is that a functionary like the district local governments must bring his discretion to bear on each case and consider the same on merits. In doing so he may have regard to undertakings which are compatible with the powers to be exercised.

It can be seen from the said letter that the respondent was categorically directing the district local governments to ignore the lead Agency arrangement. *As per the letter dated 17<sup>th</sup> August, 2016, this arrangement does not provide for the previous arrangements that involved the Lead Agency.*

Public authorities are allowed to make decisions that affect the public on day-to-day basis. In making these decisions, they are allowed to take various considerations into account, and they even take into account the public interest. They are allowed to make policies that guide them in making decisions but these policies cannot be applied rigidly as to prevent them from exercising their discretion to consider each individual case on its merits.

Where this happens, the courts will not hesitate to quash any decision made pursuant to such policy and also to declare the policy unlawful for fettering the discretion of the public authority or which amounts to dictation on what should be done.

The decision of the respondent in this matter has the same effect of fettering the discretion of the District Local Government Administration and the same is illegal, unlawful and null and void.

This issue is resolved in the positive.

## ISSUE TWO

*Whether the decision communicated in the three letters dated 22<sup>nd</sup> September Kabale, Kanungu and Rukungiri District Local Governments for the procurement of a total of 17,040,000 tea seedlings worth 7,668,000,000/= without the involvement of the Lead Agency amounted to a change of Government policy?*

The letter of the respondent to the different district local government administration was changing the policy of the Government. The applicant contended that this could not amount to change of policy at the time which required the government agencies partnering with private sector to provide extension services to the agricultural sector.

The respondent contended that this was not a change of policy but rather a communication of a Government policy change which had earlier been communicated by the permanent Secretary of the ministry of Agriculture, Animal Industry and Fisheries.

The decision to change policy must weighed against any such person's interest. This cannot be fairly done without according that person an opportunity to be heard. This implies that before any public body attempts to change a policy that adversely affects some persons then such persons ought to be heard before the policy could be changed.

In the present case the applicant contends that he was never heard before the change of policy and any attempt to affect its rights accruing from the Memoranda of Understanding with the different district Local governments would be such a breach of the applicant's legitimate expectation.

A public change of policy may be challenged as a denial of substantive legitimate expectation. Generally speaking, though, all that can be

legitimately expected is that the policy as it exists at the time will be applied to the case at hand.

The establishment of any policy, new, or substitute, by a public body is in principle subject to Wednesbury review.

Where there was no undertaking but the impact of the authority's past conduct on those affected was 'pressing and focused' procedural protection (i.e consultation and notice) would be required. See *R.(Niazi) v Home Secretary [2008] EWCA Civ 755* and *Abdi v Secretary of State for the Home Department [2005] EWCA Civ 1363*.

The principle of legitimate expectation is concerned with the relationship between public administration and the individual. It seeks to resolve the basic conflict between the desire to protect the individual's confidence in expectations raised by administrative conduct and the need for the administrators to pursue changing policy objectives. The principle means that expectations raised as a result of administrative conduct may have legal consequences. Either the administration must respect those expectations or provide compelling reasons why the public interest must take priority.

Therefore the principle of legitimate expectation concerns the degree to which an individual's expectations may be safeguarded in the face of a change of policy which tends to undermine them. The role of the court is to determine the extent to which the individual's expectation can be accommodated within the changing policy objectives.

There was a change of policy as set out by the letters written by the respondent Acting Executive Director however, the said change was introduced without according the applicant as a stakeholder any

consultation or hearing in order not to affect their rights accruing from the Memoranda of understanding.

The said change of policy would be challenged on those grounds.

This issue is resolved in the positive.

### ISSUE THREE

*Whether the order of Certiorari could issue to quash the decision of the respondent communicated in the three letters dated 22<sup>nd</sup> September, 2016 delegating to Kabale, Kanungu and Rukungiri District Local Governments for the procurement of 17,040,000 tea seedlings worth 7,668,000,000/= without the involvement of the Lead Agency?*

This issue is directly related to the first issue. Since the said issue was resolved in the positive, then it would automatically follow that the said decision could be quashed.

The applicant has submitted that the certiorari issues to quash decisions which are ultra vires or vitiated by error on the face of the record or are arbitrary or oppressive.

The respondent denies ever taking any decision to stop or terminate the applicants from working with the respective district local government Administration. The respondent's letter is clear that it was having the effect of change of policy or directing the districts to side-line the applicants as Lead Agencies.

The primary purpose of certiorari is to quash an ultra-vires decision. By quashing the decision certiorari confirms that the decision is a nullity and is to be deprived of all effect. See *Cocks vs Thanet District council [1983] 2 AC 286*

In simple terms, certiorari is the means of controlling unlawful exercises of power by setting aside decisions reached in excess or abuse of power. See *John Jet Tumwebaze vs Makerere University Council and Another HCMC No. 353 of 2005*

The effect of certiorari is to make it clear that the statutory or other public law powers have been exercised unlawfully, and consequently, to deprive the public body's act of any legal basis.

The further effect of granting an order of certiorari is to establish that a decision is ultra vires, and set the decision aside. The decision is retrospectively invalidated and deprived of legal effect since its inception.

The applicant has prayed for the quashing of the decision of the respondent since it was illegal and unlawful and reached in breach of rules of fairness.

This issue would be resolved in the positive.

#### **ISSUE FOUR**

*Whether the decision of the respondent communicated in the three letters dated 22<sup>nd</sup> September, 2016 delegating to Kabale, Kanungu and Rukungiri District Local Governments for the procurement of 17,040,000 tea seedlings worth 7,668,000,000/= without the involvement of the Lead Agency interfered with the implementation of the subsisting Memorandum of understanding between the applicants and Kanungu District Local Government.?*

This issue is related to the earlier resolved issues and the applicant contends that the action of the respondent through the different letters has affected the memorandum of Understanding with the different local governments.

According to the court record, the applicant applied for interim orders and later temporary injunctions to restrain the actions of the respondent. This would imply that there is definitely some effect to the implementation of the memorandum of understanding although parties through evidence they failed to show the extent of the effect.

This issue is therefore resolved in the positive.

### ***ISSUE FIVE***

#### ***Whether the applicants are entitled to the reliefs sought?***

The ever-widening scope given to judicial review by the courts has caused a shift in the traditional understanding of what the prerogative writs were designed for. For example, whereas *certiorari* was designed to quash a decision founded on excess of power, the courts may now refuse a remedy if to grant one would be detrimental to good administration, thus recognising greater or wider discretion than before or would affect innocent third parties.

The grant of judicial review remedies remains discretionary and it does not automatically follow that if there are grounds of review to question any decision or action or omission, then the court should issue any remedies available. The court may not grant any such remedies even where the applicant may have a strong case on the merits, so the courts would weigh various factors to determine whether they should lie in any particular case. See *R vs Aston University Senate ex p Roffey* [1969] 2 QB 558, *R vs Secretary of State for Health ex p Furneaux* [1994] 2 All ER 652.

The court grants the following orders;

- (1) A declaratory Order that the respondent's decision communicated on 22<sup>nd</sup> September 2016 is as far as it purports to exclude District local

Governments of Kabale, Kisoro, Kanungu, Rukungiri, Ntungamo and Mitooma from working with the applicants who are lead agencies under Memoranda of Understanding in null and void, illegal and unlawful.

(2) An Order of Certiorari issues to quash the decision of the respondent communicated on 22<sup>nd</sup> September 2016 that purports to Exclude District local Governments of Kabale, Kisoro, Kanungu, Rukungiri, Ntungamo and Mitooma from working with the applicants who are lead agencies under Memoranda of Understanding for the 'Tea Development Project'.

(3) An Order of Prohibition issues against the respondent restraining her from further interfering with the implementation of the subsisting Memoranda of Understanding entered into between the applicant and the respective District Local Governments of Kabale, Kisoro, Kanungu, Rukungiri, Ntungamo and Mitooma.

The application is allowed with costs against the respondent.

I so Order.

**SSEKAANA MUSA**

**JUDGE**

**4<sup>th</sup> /09/2018**